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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,
Petitioners,

v.

ALLEGHANY CORPORATION, ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 12, 1965

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MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

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v.

ALLEGHANY CORPORATION, ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Margaret L. Holt and Kathleen L. McMahon petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in this case April 21, 1965.

Opinions Below

The opinions of the Court of Appeals, Judge Hays dissenting (App. A, *infra,* pp. 1-9a), are not yet reported. The District Court did not render an opinion. Its order, dated April 9, 1965, together with the oral remarks of the Honorable Sylvester J. Ryan, D. J., in lieu of an opin-

ion, are printed in appellants' appendix on the appeal to the Court below (pp. 32-39a).

Jurisdiction

The Court of Appeals rendered its decision April 21, 1965, and judgment was entered that day (App. A, *infra*, p. 1a). It denied petitioners the right to intervene in *Alleghany* v. *Kirby**, for purposes of presenting a petition for a writ of certiorari. Since this petition as to the right to intervene and the petition as to the merits of *Alleghany* v. *Kirby* are "mutually dependent", Mr. Justice Harlan by order and memorandum dated April 27, 1965 (App. C, *infra*, pp. 12-13a), made the filing of both petitions by May 12, 1965, a condition to his grant of an extension to that date of the time within which to file the petition on the merits of *Alleghany* v. *Kirby*.**

Jurisdiction of this Court on this petition is invoked under 28 U. S. C. 1254(1) and Federal Rule of Civil Procedure 24(a)(2).

Question Presented

Where the principal defendant reacquired control of a corporation during the pendency of an appeal of its case against him, do minority shareholders have the right to intervene under Federal Rule 24(a)(2) to petition for a writ of certiorari upon learning that the new board of directors has voted to abandon the case by instructing the corporation's attorneys not to petition for such a writ?

---

*Reported on rehearing *en banc* at 340 F. 2d 311, affirming by an evenly divided court (4-4) the judgment of the District Court whose opinion is reported at 218 F. Supp. 164. The three opinions of the original Second Circuit panel are reported at 333 F. 2d 327 (2-1 for affirmance).

**In keeping with the provisions of Mr. Justice Harlan's order, a petition in *Alleghany* v. *Kirby* was filed simultaneously herewith under the caption *Holt* v. *Kirby*.

Federal Rule Involved

The Federal Rule of Civil Procedure involved is Rule 24(a)(2) (App. D, *infra*, p. 17a). It provides in pertinent part:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *."

Statement

The pivotal issue presented by this petition is whether minority shareholders, in the circumstances described below, have the right to intervene to present the companion petition in *Holt* v. *Kirby*.

The Nature of the Litigation In Which Intervention is Sought

Holt v. *Kirby* was commenced in the Southern District of New York on September 8, 1960, as a derivative action on behalf of Alleghany Corporation ("Alleghany") against its then controlling shareholder and chief executive officer and certain other of its directors (App. Int. A 8-9a).* It involves a controversy as to the validity of Kirby's

*Hereinafter references to the various appendices in the principal appeal and the intervention appeal will be as follows:

"App. A. 269a": Appellant Alleghany's Appendix in the principal case.

"App. Int. A. 6a": Appellants Holt and McMahon's Appendix in the intervention appeal.

"Ay. Int. App. 12": Appellee Alleghany's Appendix in the intervention appeal.

References to any matter in the record below which has not been printed will be preceded by "R."

settlement of prior parallel and related derivative actions pending against him and others in the United States District Court for the Southern District of New York and the New York Supreme Court in and for New York County. It is alleged that the settlement was fraudulent and should be set aside or nullified and relief granted on the underlying claim. In the alternative, damages are sought in a sum in excess of $61,000,000, the value of the securities unlawfully obtained from Alleghany's portfolio in a self-dealing transaction which was the subject of the prior actions and fraudulent settlement (App. Int. A. 9a). Following a change in management, Alleghany itself assumed prosecution of the action pursuant to an order of the District Court made and entered June 26, 1962 (App. Int. A. 10a). Thereafter, the case was tried and appealed as one brought by the corporation.

On June 5, 1963, the District Court entered judgment dismissing the complaint (reported *sub nom. Alleghany* v. *Kirby,* 218 F. Supp. 164) and Alleghany noticed an appeal, which was argued orally before the Second Circuit on December 2, 1963 (App. Int. A 10a).

Kirby Reacquires Control

Two days after that oral argument, control of Alleghany passed back to defendant Kirby (App. Int. A. 10-11a) at a special meeting of the stockholders, which was called to give effect to Kirby's purchase of sufficient shares to give him direct control of the corporation (App. Int. A. 11a). Kirby exercised his stock control by electing a new board, which included himself, his two sons and defendant Ireland (App. Int. A. 12a).

The Split Decision by the Original Panel in the Court of Appeals Leads to a 4 to 4 Deadlock on Rehearing En Banc

On May 19, 1964, the Second Circuit affirmed the dismissal of the complaint by a divided court, with three opinions (333 F. 2d 327). Judge Friendly wrote a vigorous dissent, which he concluded with the observations that he would reverse, order a further hearing, and

> "Since Kirby has regained control of Alleghany, I would instruct the judge to make provision for the continued prosecution of the action free from any control by the present directors." (333 F. 2d at 348)

Because of Judge Friendly's observation, an application was made to the Second Circuit by Townley, Updike, Carter & Rodgers (counsel from the inception prosecuting this case; hereafter "Townley Updike") for an order authorizing the taking of such further steps as were necessary, including the filing of a petition for rehearing, to protect the interests of Alleghany and its minority shareholders, or, in the alternative, for an order making such other provision for the continued prosecution of the appeal, free from control by the Kirby board, as that Court deemed just (R. 1628a).

Judge Friendly's warning, and the application it prompted, did not go unnoticed. Before the Court acted on the latter application, the Alleghany board, including defendant Kirby as well as defendants Charles T. Ireland, Jr. and Fred M. Kirby, voted unanimously to authorize a petition for rehearing *en banc*. The petition was prepared and filed (App. Int. A. 11a).

Rehearing *en banc* was granted 4 to 3 on July 22, 1964, Judges Waterman, Friendly, Smith and Hays voting in

favor of the petition, Judges Moore, Kaufman and Marshall voting against. (Judge Lumbard abstained, and one place on the bench was vacant due to Judge Clark's death) (R. 1677a). Accordingly, the case was briefed to the whole Court. After Judge Anderson filled the vacant place on the Court, and on January 12, 1965, the *en banc* Court rendered a per curiam decision which noted that the Court was evenly divided as to the proper disposition of the case with four judges (Moore, Kaufman, Marshall and Anderson) voting for affirmance and four judges (Waterman, Friendly, Smith and Hays) voting for reversal (340 F. 2d 311). Judgment was entered accordingly.

The Board Abandons the Litigation and Petitioners Move to Intervene

On February 9, 1965, the Alleghany board met and considered the written opinion of Townley Updike, counsel of record, which recommended that a petition for certiorari be filed. That board also had obtained an opinion of outside counsel advising that the directors would not be personally liable whether they authorized such a petition or not (App. Int. A. 12a, 7-9b). This time, unlike the situation when the Kirby board considered rehearing, defendant Kirby, as well as his son, Allan P. Kirby, Jr., and defendants Ireland and Fred M. Kirby, all absented themselves from the meeting prior to the board's consideration and vote on proceeding with or abandoning the case (App. Int. A. 12a). The remaining members of the board voted unanimously (one member abstaining) not to authorize a petition for certiorari. Alleghany requested, received and paid the final bill of Townley Updike (App. Int. A. 12a).

The board's decision was not communicated to its shareholders by letter or by any other public announcement (App. Int. A. 2b). On April 4, 1965, the petitioners, who own between them Alleghany preferred stock with an

aggregate market value of approximately $46,000 (App. Int. A. 14a, 17a), learned of that decision and determined to apply through Townley Updike for permission to intervene in order to petition this Court in the right of Alleghany for a review that would resolve the issues which had deadlocked the Second Circuit (App. Int. A. 8a).

On April 8, 1965, petitioners obtained an order requiring the Corporation and defendants to show cause before the United States District Court for the Southern District of New York why intervention should not be permitted as of right so that they, as shareholders of Alleghany, might petition for a writ of certiorari (App. Int. A. 3b). The following day Chief Judge Ryan, who heard the motion because the trial judge had died, denied the motion for intervention as of right on the grounds that it was not timely and that the interests of the intervenors had been adequately represented (App. Int. A. 39a). Counsel representing the defendants, as well as new counsel representing Alleghany, strongly opposed the motion. Alleghany's decision to oppose was made, we were informed, by a telephone poll of the Kirby board (see Ay. Int. App. 1-2). Judge Ryan denied intervention from the bench.

On Monday, April 12, 1965, the last day to petition for certiorari, petitioners applied to the Second Circuit *en banc* for an order recalling its mandate and allowing intervention, or in the alternative, treating the papers on that application as an appeal from Judge Ryan's denial of intervention the preceding Friday (App. Int. A. 3-4b). Petitioners also applied to Mr. Justice Harlan for an extension of time to file a petition on the merits so that the right to do so would not be lost by the passage of time and procedure.

On April 12, the Second Circuit *en banc* denied the motion to recall the mandate and ordered a prompt appeal, with briefs due April 15, and oral argument on April 19 (R. 1803a). Mr. Justice Harlan was informed of this dis-

position, and on April 13, granted an extension of time to file a petition on the merits within five days after the Second Circuit's decision on the intervention appeal or until April 29, whichever date was earlier (App. B, *infra,* pp. 10-11a).

The Opinions of the Court of Appeals

The intervention appeal was argued to a three-judge panel of the Second Circuit on April 19, and on April 21, by a divided court, it affirmed the denial of intervention. Judge Kaufman, with Judge Anderson concurring, wrote for the majority. Judge Hays dissented in a separate opinion (App. A, *infra,* pp. 1-9a).

Judge Kaufman ruled that petitioners had failed to show that their interests as minority shareholders were inadequately represented within the meaning of Rule 24(a)(2). Although the case was being abandoned so that there was to be no representation of the shareholders' interests in the courts, Judge Kaufman held that in the absence of a showing of bad faith, collusion or negligence, the petitioners were not entitled to intervene. He reasoned that Kirby and other defendants absented themselves leaving "independent" directors to determine whether Alleghany should proceed. Judge Hays, in dissent, succinctly pointed out the frailty of this reasoning in the face of Kirby's direct control of the Corporation, stating that it was "naive to believe that the board of directors was not subject to the determinative influence of Kirby when it voted not to proceed with this case" (App. A, *infra,* p. 9a).

Judge Kaufman also ruled that petitioners were not timely, even though they applied for intervention only four days after learning of the corporate decision to abandon the case, a decision that had not been communicated to the shareholders by notice or by public announcement. Judge Hays, on the other hand, held that the application was

timely since the intervention would obviously not prejudice or delay the conduct of the action by the original parties, which in his view was the only relevant consideration.

On April 26, petitioners renewed their motion for enlargement of time to file a petition on the merits so that this Court would have an opportunity to consider a petition as to the right to intervene. Mr. Justice Harlan, in a memorandum, enlarged the time for a petition on the merits to May 12, 1965, upon the condition that this petition also be filed on or before that date (App. C, *infra*, pp. 12-13a):

> "Because the judges below were so sharply divided on both phases of the matter, I am constrained to give petitioners an opportunity to have them considered together by the Court. However, I do not think the matter should go over the summer, which would be the result were I to grant the full further extension now sought, or if the time for filing for certiorari on the intervention issue remains unaccelerated."

Reasons Why the Writ As to Intervention Should Be Granted

This case presents an important question of Federal Civil Procedure and the administration of justice in the lower courts. It involves the right of minority shareholders under Federal Rule 24(a) to intervene in an action by their Corporation for the purpose of further prosecuting the case when a new board of directors, owing its office to the principal defendant, has voted to abandon the litigation against him. The decision of the sharply divided Court of Appeals denying the minority shareholders' right is, we believe, erroneous, and is in direct conflict with the decisions of two other circuits.

1. The decision below involves an important question of federal law which has not been, but should be, settled by this Court. It would deny minority shareholders of listed and publicly held corporations the right to intervene at the appellate level to petition this Court for a writ of certiorari in actions by their corporation against certain of its directors and shareholders even though the principal defendant has reacquired control of the corporation while the case was pending in the Court of Appeals, and the corporation so controlled has instructed its attorneys to abandon further appeal. Judge Kaufman required a positive showing of bad faith on the part of a board of directors elected by the vote of the controlling shareholder. If that criterion stands, then minority shareholders will be powerless in a case brought by the corporation to prevent destruction of the corporate claim by the subtle "ceremonials" of the board whose members must be *persona grata* to the one who has resumed control. The salutary principle of Rule 24(a) will be dead in such a case.

As the result of Judge Kaufman's opinion, it may well be that every derivative action, where the defendant acquires control of the corporation, will end when the defendant wants it to end, because the minority shareholder is unable to prove that "the mental state of the corporate management and its counsel" evidences bad faith or is unable to demonstrate the real effect of the "subtle or unexercised power" of the defendant. We submit such a rule misconceives the purpose of Rule 24(a)(2) and requires review by this Court. See *Molybdenum Corp. of America* v. *International Mining Corp.*, 32 F. R. D. 415 (S. D. N. Y. 1963); *Park & Tilford* v. *Schulte,* 160 F. 2d 984 (2d Cir. 1947).

2. The holding of the court below that, absent a showing of bad faith, collusion or negligence, petitioners were

not entitled to intervene when the board of directors abandoned litigation against the chairman of the board and the corporation's largest stockholder is in direct conflict with the decision of the Ninth Circuit in *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (1953) and the decisions of the District of Columbia Circuit in *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F. 2d 387 (1962) and in *Wolpe* v. *Poretsky*, 144 F. 2d 505 (1944). In all three cases intervention was allowed even though there was no charge of bad faith, collusion or negligence. In two of them the controlling fact was the abandonment of a claim against the defendant and in both intervention was allowed after final judgment and for purposes of appeal.

In *Pellegrino* the court held that where the corporation's board of directors had decided not to appeal an adverse judgment in an action against one of its directors for insider profits, representation of the minority shareholders' interest was inadequate, and he was entitled to intervene under Rule 24(a)(2).*

In *Atlantic Refining* the court held that in order to establish the inadequate representation of applicants' interest, it was not necessary to show that the party purporting to represent their interest was acting in bad faith, collusively or negligently. There the applicants sought to intervene in an action against the Secretary of the Interior in order to present defenses other than those already being

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*Alleghany's and defendants' counsel below attempted to distinguish the motion under Rule 24(a)(2) in *Pellegrino* upon the ground that the intervening shareholder there had better rights because of the provisions of § 16(b) of the Security Exchange Act of 1934. The distinction is not supported by the *Pellegrino* opinion. The court relied first on Rule 24(a) for allowing intervention and only found added support in the statutory provisions of § 16(b). A succinct analysis of the absence of any special rights to intervene in 16(b) cases beyond the rights afforded by Rule 24(a)(2) may be found in *Molybdenum Corp. of America* v. *International Mining Corp.*, 32 F. R. D. 415 (S. D. N. Y. 1963).

asserted by the Secretary. The rule enunciated in *Atlantic Refining* supports intervention here, where the applicants seek to assert a claim already deemed worthy of prosecution, not only by four members of the Court of Appeals, but by the members of the board of directors themselves when they authorized the petition for rehearing *en banc*. In *Wolpe* the court held that, even in the face of a strong presumption that a zoning board had properly performed its duties in deciding not to take an appeal, an adjoining property owner had the right to intervene under Rule 24(a)(2) because in refusing to take an appeal, the commission did not adequately represent the intervenors' interests.

The rationale of each of the foregoing cases is the same as that stated in *Kozak* v. *Wells*, 278 F. 2d 104, 110 (8th Cir. 1960):

> "[T]hat a positive showing that such representation is inadequate is not necessary. The Rule requires only that it 'may be inadequate'."*

The holding of the Court below as to the timeliness of the application to intervene is also in direct conflict with the decision of the Ninth Circuit in *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (1953), *supra*. In Judge Kaufman's view, intervention should have been sought when Kirby acquired control of the Corporation rather than when the case was dropped (App. A, *infra* p. 7a). But, *Pellegrino* holds directly to the contrary on the reasoning that since a share-

*The only case referred to by Judge Kaufman as purporting to support his position was *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961). In *Atlantic Refining*, however, the District of Columbia Circuit pointed out that this Court found it unnecessary in *Sam Fox* to pass on the question of the inadequacy of representation because it found that the applicants were not bound by the decree. That Circuit Court was also of the view that *Sam Fox* did not hold that a showing of bad faith or malfeasance was necessary in order to establish inadequacy of representation.

holder has no right to intervene while the corporation is diligently prosecuting the case, such an application is timely if made upon learning of the corporate decision not to appeal. Indeed, in *Pellegrino* the corporation, unlike Alleghany here, gave notice of its decision not to appeal and the shareholders came in within 12 days.

3. The rule proposed by Judge Kaufman is particularly egregious in the case at bar because the corporate decision to abandon the claim by not applying to this Court for a writ of certiorari occurred after the Second Circuit *en banc* had divided evenly on the question of whether the principal defendant, and now controlling shareholder, had obtained a fraudulent settlement of prior derivative actions against him. As Judge Hays noted in dissent on the intervention issue, the reason given by Alleghany "for not applying for certiorari is the fear that the corporation might win" and that a reason "given for not wanting to win is that a victory for the corporation would be embarrassing (and expensive) for Kirby." (App. A, *infra*, p. 9).

Since Kirby is not only the principal defendant but directly controls the corporation and stands to gain destruction of a potential $61,000,000 claim against him if the case is dropped, we believe not only that the injustice of the denial of intervention is manifest here, but that the principle enunciated denies the protection shareholders should have and is contrary to the proper interpretation of Rule 24(a)(2).*

*This action against Kirby was begun as a derivative shareholders' action. At the instance of Judge Dawson, after the proxy contest ousted the Kirby board of directors, the corporation was substituted as plaintiff. Had the litigation remained in a derivative posture, there would be no question of the minority shareholders' right to petition for certiorari in the underlying case. The original Kirby board which was in office when the suit was brought was unable to prevent its prosecution. There is no reason why, upon Kirby reacquiring control, the new board should be permitted to prevent it now.

The error of the majority opinion is emphasized by the fact that the new board, which the opinion calls "independent", is composed of:

1. Three directors (Hill, Rabe, Van Pelt) who are directly related to the prior litigation or the settlement thereof which is under attack in the present action (Pl. Ex. 146, App. A. 1088a; Pl. Ex. 147, App. A. 1113a; Pl. Ex. 206, App. A. 487a; Pl. Ex. 1, App. A. 583a);

2. One director (Lincoln) who represents interests having a reciprocal voting agreement with Kirby and who together own nearly 50% of Alleghany's voting stock (App. Int. A. 13b, note 3);

3. One director (Taylor) who was a Kirby nominee in the Alleghany proxy contest and returned to the Alleghany board with Mr. Kirby (N. Y. Times, Nov. 7, 1963, p. 48; Dec. 5, 1963, pp. 69-70);

4. Four directors (Odell, Hunt, Deer and Davies) who represent interests that participated in the stock transaction which returned Mr. Kirby to control of Alleghany and who presently are paying for a registration statement to offer their holdings for sale.* (N. Y. Times, Dec. 5, 1963, pp. 69-70).

Under these circumstances there should be no necessity to probe the votes of those directors in order to establish simply that petitioners' representation "may be inadequate" in this litigation. *Kozak* v. *Wells*, 278 F. 2d 104, 110 (8th

*We are informed by counsel handling the registration statement that it covers 2,300,000 shares and that the interests represented by Messrs. Odell, Hunt, Deer and Davies; i.e., Allied Properties, Coral Ridge Properties, Inc. and Gamble-Skogmo, Inc. are paying for the registration statement. Counsel also informed us that these corporations have no present intention to sell.

Cir. 1960). The significance of the vote is its result—abandonment of the case.

In the face of the foregoing, it appears that the decision below has also redefined the rules as to intervention which previously existed in the Second Circuit. *Park & Tilford* v. *Schulte,* 160 F. 2d 984 (2d Cir. 1947) There the court, contrary to Judge Kaufman's view here, permitted shareholder intervention to assert additional claims on appeal because one of the defendant-trustees and his father were members of the plaintiff's board, hence representation of minority shareholders' interests might have been inadequate under Rule 24(a)(2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted this petition for a writ of certiorari should be granted.

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May 12, 1965

APPENDIX A

Opinion of the Court of Appeals on Intervention Appeal

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 490—September Term, 1964.

(Argued April 19, 1965 Decided April 21, 1965.)

Docket No. 29652.

ALLEGHANY CORPORATION,
Plaintiff-Appellee,

—v.—

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY,
Defendants-Appellees,

RANDOLPH PHILLIPS,
Defendant,

MARGARET L. HOLT and KATHLEEN L. MCMAHON,
Applicants-Appellants.

Before:

KAUFMAN, HAYS and ANDERSON,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Ryan, *C.J.*, denying an application to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2).

Affirmed.

Appendix A

Majority Opinion, Kaufman C. J.

STUART N. UPDIKE, of Townley, Updike, Carter & Rodgers, New York, N. Y. (J. Howard Carter, Lee W. Meyer, Ronald S. Daniels, Richard J. Barnes, on the brief), *for applicants-appellants.*

MARK F. HUGHES, of Willkie, Farr, Gallagher, Walton & FitzGibbon, New York, N. Y. (Vincent R. FitzPatrick, on the brief), *for plaintiff-appellee.*

WALTER R. MANSFIELD, of Donovan, Leisure, Newton & Irvine, New York, N. Y. (John E. Tobin, on the brief), *for defendants-appellees.*

KAUFMAN, *Circuit Judge*:

As Judge Friendly recently wrote, "The affairs of Alleghany Corporation, from its founding by the Van Sweringen brothers, have given rise to a flood of litigation that must be unparalleled in American corporation law." *Willheim* v. *Murchison,* —— F. 2d —— (2 Cir. Feb. 10, 1965). The aspect of that litigious history presently before us—which may occupy no more than a footnote when the definitive chronicle is written—involves an appeal by Margaret L. Holt and Kathleen L. McMahon ("the applicants"), as owners of 650 and 550 shares, respectively, of Alleghany preferred stock, from an order of the District Court denying them leave to intervene as a matter of right, pursuant to Fed. R. Civ. P. 24(a)(2), in a chapter of the history which recently occupied this Court's attention for more than a year. *Alleghany Corp.* v. *Kirby,* 333 F. 2d 327 (1964), *aff'd by equally divided Court en banc,* 340 F. 2d

Appendix A

Majority Opinion, Kaufman C. J.

311 (1965). Intervention is sought at this last-minute stage of proceedings that trace back to 1954 in order to petition derivatively, on behalf of the Corporation, for a writ of certiorari from the Supreme Court to review the judgment dismissing Alleghany's complaint in an action to set aside the settlement of an earlier stockholders' derivative action. The District Court denied the application, finding and concluding, with reference to the explicit language of Rule 24(a)(2), that it was untimely and that the applicants "have had and do have adequate representation." We affirm.

Because the complex factual basis of the underlying litigation was fully delineated in this Court's earlier opinions, 333 F. 2d 327, it suffices to set out in skeletal chronological form the facts relevant to this appeal. The basic action, in which the applicants seek to intervene, began in September 1960 as a stockholders' derivative suit brought by John D. Murchison, Clint W. Murchison, Jr., and Gerard L. Fossland (hereafter, together with affiliates, "the Murchison group") against the Corporation, Allan P. Kirby and others ("the Kirby group"). On June 26, 1962, after the Murchison group had, by shareholder vote, wrested control of the Board of Directors from the Kirby management, the late Judge Dawson approved the substitution of the Corporation as plaintiff and the dropping of the prior shareholder plaintiffs. On May 20, 1963, Judge Dawson dismissed the complaint, 218 F. Supp. 164, and the Murchison Board of Directors thereafter authorized the applicants' counsel in this action, who had represented first the Murchison group and thereafter the Corporation, to appeal to this Court. On December 4, 1963, two days after a regular panel of this Court heard oral argument of the appeal,

the seesaw game between Murchison and Kirby continued and the Kirby group regained control of the Corporation. The appeal, of course, continued and after we affirmed the judgment dismissing the complaint, one judge dissenting, on May 20, 1964, the Board of Directors, including defendant Kirby, voted unanimously to authorize a petition for rehearing *en banc*. The petition having been granted and the Court having announced on January 12, 1965, that it was evenly divided, the judgment below was accordingly affirmed.

The Alleghany Board of Directors thereafter consulted both the law firm that had represented the Corporation before this Court and now appears for the applicants, and other independent counsel who now appear for the Corporation in this phase of the litigation, concerning the advisability of petitioning the Supreme Court for a writ of certiorari and the responsibility of the Board towards the Corporation's shareholders in making that decision. On February 9, 1965, the alleged independent Board members —interested defendants Allan P. Kirby, Charles T. Ireland, Jr., and Fred M. Kirby having absented themselves from the meeting and one director abstaining for personal reasons—voted unanimously not to authorize a petition for a writ of certiorari. The papers filed with Chief Judge Ryan on the instant belated application for intervention reveal that the independent directors, in reaching that decision, considered not only the relatively modest cost of an application for certiorari, but also the consequences to the Corporation if the writ were granted and the judgment dismissing the complaint reversed.[1]

[1]An affidavit by James W. Deer, a member of the Board, stated that the directors considered, *inter alia*, the following factors: (a)

Appendix A

Majority Opinion, Kaufman C. J.

Although the sophisticated applicants for intervention concededly "followed the fortunes or ill fortunes of the Alleghany Corporation through this litigation with pretty close attention," they allegedly did not learn of the Board's decision not to seek certiorari until April 4, 1965. Several days later, upon appellants' application, Chief Judge Ryan signed an order directing the Corporation, Kirby and the other defendants to show cause why intervention should not be permitted. After a careful hearing, he denied intervention, noting among other considerations that the applicants had watched closely the course of the litigation from the outset but sought to intervene only on the eve of the deadline for filing a certiorari petition.[2]

The likelihood that if certiorari were granted the litigation would continue for many years at great expense, and (b) that it would proceed against Allan P. Kirby alone "even though he was the only person . . . as to whom everyone . . . had agreed no case of fraud or wrong-doing had been made out." (c) If the settlement were reopened the Corporation might lose control of Investors Diversified Services, Inc., an investment valued at more than $115 million and constituting over one-half its total assets. (d) Continued litigation would deprive the shareholders of a management able to concentrate on corporate affairs. (e) The likelihood, conceded in the District Court, that certiorari would not be granted. These reasons relate not to a fear of ultimate victory for the corporation, which the dissent perhaps misunderstandingly characterizes as "astonishing frankness," and much less to possible embarrassment and expense to Kirby. Rather, they are valid policy considerations hinged to the problems attendant upon lengthy continuation of possibly, if not probably, fruitless litigation.

[2]On April 12, 1965, the last day for filing the certiorari petition, this Court denied the applicants' request to recall its mandate but set down the appeal from Chief Judge Ryan's order for April 19. On the same day, the applicants requested the Circuit Justice to extend the Corporation's time to petition for certiorari. Mr. Justice Harlan, "anticipating that [we would] act promptly," extended the time for filing the petition for a period of five days after our judgment on this appeal, or to and including April 29, 1965, whichever date proves to be earlier.

Appendix A

Majority Opinion, Kaufman C. J.

We fully agree with the District Court's conclusion that, on the record before it, the decision of the independent members of the Board of Directors not to apply for certiorari, after consultation with independent counsel and full presentation and consideration of relevant business and legal implications, did not result in "inadequate representation as a matter of law." We know of no proposition of law that permits shareholders, absent any allegations of bad faith, collusion or negligence, concededly neither present nor charged here, cf. *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683 (1961), to intervene, as of right, in order to continue litigation that independent members of the Board of Directors, acting in good faith and in the exercise of sound business judgment, have decided to terminate. Indeed, the independent directors who voted unanimously to take this step represent approximately 1,800,000 shares of Alleghany common stock whose equity would increase by $10,000,000 if the applicants' prophecy of ultimate victory were to be fulfilled.

In any event, it is necessary to uphold the order denying intervention at this stage, when this protracted litigation which has occupied so many judges' time for so long is taking its last gasp of breath, since we do not believe Judge Ryan abused his discretion in finding that the applicants' midnight-hour efforts were untimely. See *McKenna* v. *Pan American Petroleum Corp.*, 303 F. 2d 778 (5 Cir. 1962); *Tesseyman* v. *Fisher*, 231 F. 2d 583 (9 Cir. 1955); *Simms* v. *Andrews*, 118 F. 2d 803 (10 Cir. 1941). See generally 4 Moore, Federal Practice § 24.13 at 99 (2d ed. 1963). As we see it, the timeliness requirement, specifically articulated in Rule 24(a), is related to the question whether the shareholders' interests are or may be in-

Appendix A

Majority Opinion, Kaufman C. J.

adequately represented, for whether an application to intervene is prompt or tardy also turns on when the interests of the proposed intervenors were no longer properly represented. As we have noted, there are no allegations or claims that the Board of Directors acted in bad faith, fraudulently or dishonestly, but we shall assume, *arguendo,* that the applicants' interests may have been or are inadequately represented despite the absence of such charges because the Board of Directors was acting under what counsel, at oral argument, picturesquely characterized, but without anything more than his *ipse dixit,* as "the brooding presence" of the Kirby group.[3]

But even that *arguendo* assumption, when considered with the background of the applicants' asserted long-time interest in this litigation and the fact that the Kirby group regain direct control of the Corporation as long ago as December, 1963, would compel us to agree with the District Judge's findings and to conclude that he acted well within the bounds of his discretion in determining that the application to intervene—made sixteen months later—was untimely.[4]

We have specifically rejected the applicants' suggestion that adequacy of representation should, under these cir-

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[3]Applicants' counsel expressly refused to characterize the Board as "dominated" by the Kirby group.

[4]If, as the dissent suggests, timeliness depends on whether the granting of intervention will prejudice or delay the conduct of the action by the original parties, then we are led to the implausible conclusion that there is a *right* to intervene regardless of the time that has elapsed since inadequate representation arose. In any event, since the applicants admittedly kept close watch on the course of this litigation and since it is conceded that there was no duty to inform all the shareholders of the decision not to authorize a petition for certiorari, we do not believe that the District Court abused its discretion.

cumstances, be judged solely by the soundness or improvidence of the Board's decision to terminate the litigation. Suppose, for example, that instead of eight directors voting unanimously not to petition for a writ of certiorari, the same result was based on a five to three vote, with the three dissenting directors being fully independent (three hypothetical bishops or even the applicants themselves and a member of the law firm they have engaged). We have no doubt that after such a decision, and absent any claim of fraud or wrongdoing, the shareholders could not intervene *as of right* on the basis of inadequate representation, notwithstanding the fact that this Court affirmed the lower Court judgment by a 4-4 vote.[5]

Adequacy of representation, at least in the context of this case, depends not on our assessment of whether the Board should have authorized a certiorari petition, but rather on whether shareholder interests were fully and fairly considered when the Board reached its decision. Stated somewhat differently, the mere fact that a particular decision is adverse to certain interests does not necessarily mean those interests were not adequately represented in the decision-making process or in the decision itself.

Chief Judge Ryan acted well within the bounds of his discretion in refusing to resuscitate this dying litigation which has received so much judicial attention in so many courts for so many years when he denied the application for intervention as untimely.

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[5]If the applicants are aggrieved by any possible wrongdoing of the Board of Directors in deciding to terminate the litigation, the District Court's denial of intervention does not preclude a derivative suit based on such claims.

Appendix A

Dissenting Opinion, Hays C. J.

Affirmed. The mandate shall issue forthwith, all the Judges of this panel so directing.

HAYS, *Circuit Judge*:

I dissent.

It seems to me to be naive to believe that the board of directors was not subject to the determinative influence of Kirby when it voted not to proceed with this case. No one who knows anything about the conduct of corporate enterprise considers that the major stockholder's withdrawal from the room when a vote is taken amounts to anything more than an empty ceremonial.

If corroboration is needed for the proposition that this board of directors did not adequately represent the interests of the applicants for intervention, ample corroboration is to be found in the reasons given, with astonishing frankness, for abandoning the litigation. The principal reason given for not applying for certiorari is the fear that the corporation might win. One of the reasons given for not wanting to win is that a victory for the corporation would be embarrassing (and expensive) for Kirby.

The application for intervention was obviously "timely" within the meaning of Rule 24. The requirement of timeliness in that Rule refers not to some vague standard of laches but to the making of an application at a time when granting it will not prejudice or delay the conduct of the action by the original parties. There is no such prejudice or delay here. Nor, for that matter, was there any laches. The application was made promptly upon the discovery that the applicants' interests were no longer being adequately represented.

APPENDIX B

Order and Memorandum of Mr. Justice Harlan
Dated April 13, 1965

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

MARGARET L. HOLT, ET AL.,

Petitioners,

VS

ALLAN P. KIRBY, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners, and of the opposition thereto,

IT IS ORDERED that the time for filing a petition for writ of certiorari be, and the same is hereby, extended for a period of five (5) days after the judgment of the United States Court of Appeals for the Second Circuit on the "intervention" appeal, or to and including April 29, 1965, whichever date proves to be earlier.

s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 13th
day of April, 1965.

Appendix B

Order and Memorandum of Mr. Justice Harlan Dated April 13, 1965—(Continued)

Anticipating that the Court of Appeals will act promptly on the "intervention" appeal now set for hearing on April 19, 1965, I am constrained to extend petitioners' time for filing a petition for certiorari from the judgment of the Court of Appeals rendered January 12, 1965, to and including five days next following the Court of Appeals' decision of the intervention appeal, or to and including April 29, 1965, whichever date proves to be the earlier. Petitioners may, within the governing period, apply to me for a further extension of time to file the aforesaid petition for certiorari. Such further application may be made on the papers presently before me, supplemented by any additional papers that either side may wish to submit. I, of course, intimate no view upon any phase of the matters in controversy.

J. M. H.

April 13, 1965

APPENDIX C

Order and Memorandum of Mr. Justice Harlan Dated April 27, 1965

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

MARGARET L. HOLT, ET AL.,

Petitioners,

VS

ALLAN P. KIRBY, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for petitioners and of the oppositions of respondents thereto,

IT IS ORDERED that the time for filing a petition for certiorari in the underlying controversy be, and the same is hereby, extended to and including May 12, 1965. This order is conditioned, however, upon the filing of a petition for certiorari on the intervention issue on or before that date.

s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 27th
day of April, 1965.

Appendix C

Order and Memorandum of Mr. Justice Harlan Dated April 27, 1965—(Continued)

The underlying controversy and the intervention issue are mutually dependent, and although no application is made to me with respect to the latter, I think it is appropriately involved in the proper disposition of this request for a further extension of time within which to petition for certiorari in the underlying controversy.

Because the judges below were so sharply divided on both phases of the matter, I am constrained to give petitioners an opportunity to have them considered together by the Court. However, I do not think the matter should go over the summer, which would be the result were I to grant the full further extension now sought or if the time for filing for certiorari on the intervention issue remains unaccelerated.

Accordingly, I shall extend petitioners' time to file for certiorari in the underlying controversy to and including May 12, 1965, on condition, however, that their petition for certiorari on the intervention issue is also filed by that date. If respondents file their papers in opposition on or before May 24, 1965, this should enable the Court to act on both petitions before the end of this Term. In view of the time elements involved, the parties need not proceed on printed papers.

J. M. H.

April 27, 1965

APPENDIX D

Per Curiam Decision of Court of Appeals *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 154—September Term, 1964.

(Submitted November 9, 1964 Decided January 12, 1965.)

Docket No. 28397

ALLEGHANY CORPORATION,

Plaintiff-Appellant,

v.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY,

Defendants-Appellees,

RANDOLPH PHILLIPS,

Defendant.

Before:

WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS, MARSHALL, ANDERSON,

Circuit Judges.

Appendix D

On Rehearing

TOWNLEY, UPDIKE, CARTER & RODGERS (Stuart N. Updike, J. Howard Carter, Lee W. Meyer, Ronald S. Daniels, Richard J. Barnes, Peter G. Kelley, of counsel), New York City, *for Plaintiff-Appellant.*

DONOVAN, LEISURE, NEWTON & IRVINE (Granville Whittlesey, Jr., James V. Hayes, Robert M. Loeffler, Walter L. Stratton, John J. McCann, Ben Vinar, of counsel), New York City, *for Defendants-Appellees.*

PER CURIAM:

Subsequent to the filing of the three opinions in this case on May 19, 1964, reported at 333 F. 2d 327, plaintiff-appellant petitioned for a rehearing by the full court. This petition was granted on July 22, 1964, Chief Judge Lumbard disqualifying himself and not participating. Later, the court having ordered that the rehearing be without oral argument, briefs were submitted by the parties, the last and final brief in rebuttal having been filed on November 9, 1964.

Upon consideration of the petition and subsequently filed memoranda, the court is evenly divided as to proper disposition of the case, for Judges Moore, Kaufman, Marshall

and Anderson would affirm the decision below, reported at 218 F. Supp. 164 (S. D. N. Y. 1963, Dawson, *J.*) and Judges Waterman, Friendly, Smith and Hays would reverse that judgment and would remand the case to the district court for further hearing there.[1]

Accordingly, the judgment below is affirmed.

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[1]In its reply brief on rehearing *in banc* appellant points out for the first time that since the claim in the state court suit relating to the exchange of stock was grounded in part on an allegedly false and misleading proxy statement, see § 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a) and SEC Rule X-14A-9, federal jurisdiction existed, see *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), and argues that § 27 of the 1934 Act, 15 U. S. C. § 78aa, made such jurisdiction exclusive and rendered the state judgment void. We find it unnecessary to rule on the argument. For, apart from any other factors, the issue of jurisdiction was raised in and decided by the New York courts, 1 App. Div. 2d 662, 146 N. Y. S. 2d 213 (1955), motions for reargument and for leave to appeal to the Court of Appeals denied, 1 App. Div. 2d 773, 149 N. Y. S. 2d 213 (1956); and no attempt to secure review by the Supreme Court of the United States was made. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78 (1939). On this the court is unanimous.

APPENDIX E

Rule 24, Federal Rules of Civil Procedure

INTERVENTION.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof. [As amended Dec. 27, 1946, effective March 19, 1948.]

* * *

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. § 2403. [As amended Jan. 21, 1963, effective July 1, 1963.]

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

v.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LEE W. MEYER
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May 12, 1965